87-1726

Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1987

SULTAN EL GAWLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether Petitioner is entitled to a new trial because the instruction given by the trial judge on the defense of entrapment permitted the jury to reject the defense without considering Petitioner's lack of predisposition to commit the crime, which this Court has recognized is the principle aspect of the entrapment defense?

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No.

In The

Supreme Court of the United States

October Term, 1987

SULTAN EL GAWLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Sultan El Gawli prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third District Circuit affirming the judgment of the United States District Court for the District of New Jersey denying Petitioner a new trial.

OPINIONS BELOW

The January 19, 1988 opinion of the United States Court of Appeals affirming the judgment of the District Court may be

found in the appendix of this petition (1a).[1] On February 17, 1988, the Court of Appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* (23a). On February 25, 1988, the Court of Appeals amended its January 19, 1988 opinion (19a).

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment affirming the judgment of the District Court on January 19, 1988 (22a). A timely petition for rehearing and suggestion for rehearing *en banc* was denied on February 17, 1988 (23a). The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States and Title 22 U.S.C. Sec. 2778(b) (2) are involved in this case. These provisions are set out in the appendix to this Petition (26a).

STATEMENT OF THE CASE

On January 29, 1986, a one-count indictment was returned against Petitioner charging him with conspiring to export without a license certain articles designated on the United States Munitions List. 22 U.S.C. Sec. 2778(b) (2). At trial, Petitioner asserted the defense of entrapment. He introduced substantial evidence that he was induced to engage in the alleged arms transaction by an individual named Zakkary, who was cooperating with the government, who had posed as an arms procurer, who had visited

[1]References designated "a" are to the appendix to this Petition. References designated "Da" are to the appendix submitted to the United States Court of Appeals for the Third Circuit.

Petitioner repeatedly to engage his trust and who had feigned being stricken with cancer to elicit Petitioner's sympathy and assistance. (Da 546, 469).

In addition to offering evidence that he was induced by the government to participate in an unlawful transaction, Petitioner offered substantial evidence that he was not predisposed to commit the crime and, in fact, had an unblemished background. The proofs offered by Petitioner established that he is a middle-class businessman who came to the United States from Egypt in 1968 in order to avoid the violence and political turmoil of the middle-east (Da509). During his first 1-1/2 years in this country, Petitioner worked for little pay in a bakery (Da511). After marrying an American citizen of Egyptian descent, Petitioner began his own bakery, which thrived (Da512-13). In 1977, Petitioner became a United States citizen (Da534).

Witnesses testified that Petitioner is a respected religious leader, who is honest, trustworthy, generous, conservative and non-violent (Da192-97). Until his arrest for the charges leading to this appeal, Petitioner had never been arrested or involved with the police (Da570). Petitioner testified that he was not predisposed to dealing with arms because he was an honest, peaceful businessman who had never engaged in weapons trade.

Though Petitioner did admit that he served as an intermediary for arms transactions involving Zakkary, he testified that he had agreed to serve in that capacity only after Zakkary had first raised the subject, had made relentless requests for Petitioner's participation, and had solicited Petitioner's sympathy by feigning a feigned cancerous condition.

Upon the conclusion of the trial, the trial judge instructed the jury that the government bore the burden of proving beyond a reasonable doubt that defendant was not entrapped (Da808-10). Two hours after deliberations began, this instruction was repeated to the jury, which had requested further instruction on the issue of entrapment (Da815).

The next day, the jurors again requested clarification of the legal definition of entrapment. This time, the trial judge instructed the jury, over the objection of defense counsel, that the government had to disprove only one element of the entrapment defense beyond a reasonable doubt in order to defeat the defense:

> [I]t remains on the Government to prove beyond a reasonable doubt that the defendant was not induced by the Government to commit the crime *or* they must prove beyond a reasonable doubt that he was predisposed to commit the crime. *So the burden on either the issue of inducement or predisposition remains on the Government beyond a reasonable doubt.*

(Da862-65). (emphasis supplied)

The Court also gave a restrictive definition of inducement. *Id.* Ninety minutes after the supplementary instruction was given by the Court, the jury convicted Petitioner. He was sentenced to a two-year term of incarceration on September 3, 1986 (Da9), but was permitted to remain free on bail pending appeal because of the substantial issue arising out of the jury instruction on entrapment.

REASONS FOR GRANTING THE WRIT

This Petition raises a substantial issue on what the government must prove in order to defeat the entrapment defense. This Court, in *Hampton v. United States*, 425 U.S. 484, 488 (1976), and its progeny, has repeatedly emphasized that the focus of the entrapment defense is on the subjective predisposition of the accused to commit the crime. The instruction given by the trial court permitted the jury to completely ignore Petitioner's lack of predisposition and to instead focus in a vacuum, solely on the issue of inducement, in evaluating the entrapment defense.

The instruction disregarded the fluidity of the concepts of inducement and predisposition. Because these elements of entrapment are fluid and not discrete, they must be examined together in order for the jury to properly evaluate the validity of the defense. For example, strong evidence of lack of predisposition would require less of a showing of governmental inducement than would be the case if there were strong evidence of predisposition to commit the crime alleged. The fluidity of the concepts of inducement and predisposition led the Third Circuit in a previous case, *United States v. Castro*, 776 F.2d 1118, 1128 (3rd Cir. 1985), *cert. denied*, _____ U.S. _____, 106 S.Ct. 1233 (1986), to find that the government must disprove both elements of the defense in order for the jury to reject it. The decision in this case represents a radical departure from the Third Circuit's decision in *Castro*, as well as from precedents of this Court which repeatedly empahsize that the focus in entrapment cases should be on the subjective predisposition of the accused to commit the crime alleged.

I.

THE INSTRUCTION OF THE TRIAL COURT ON THE ISSUE OF ENTRAPMENT WAS ERRONEOUS AND DENIED PETITIONER DUE PROCESS OF LAW BECAUSE IT PERMITTED THE JURY TO COMPLETELY DISREGARD THE UNCONTRADICTED EVIDENCE OF PETITIONER'S LACK OF PREDISPOSITION TO COMMIT THE CRIME ALLEGED IN EVALUATING THE ENTRAPMENT DEFENSE.

The entrapment defense "focuses on the intent or predisposition of the defendant to commit the crime." *Hampton v. United States*, 425 U.S. 484, 488 (1976). *See also United States v. Russell*, 411 U.S. 423, 433 (1973). In determining whether entrapment has been established, this Court emphasized in *Sherman v. United States*, 356 U.S. 369, 372, (1958), that a line must be drawn between "the

trap for the unwary innocent and the trap for the unwary criminal." The defense of entrapment is not defeated merely because the government may afford opportunities for the commission of the offense. *Sorrells v. United States*, 287 U.S. 435, 441 (1932); *Sherman v. United States*, 356 U.S. 369, 372 (1958). Instead, it is only "when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play." *United States v. Russell*, 411 U.S. 423, 436 (1973).

In *United States v. Castro*, 776 F.2d 1118 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1029 (1986), the Third Circuit held that it was that it was error for the trial court not to have charged the jury on the inducement component of the entrapment defense. In so concluding, the Court specifically noted that the government had the burden of disproving *the entirety* of defendant's entrapment defense:

> [O]nce the court decides to give an entrapment charge, the court must instruct the jury that the government must prove beyond a reasonable doubt *both* that the defendant was not induced by the government to commit the crime *and* that he was predisposed to commit the crime.

Id. at 1128 (citations omitted) (emphasis supplied).

Indeed, so emphatic was the Third Circuit in ruling that the government had the burden of disproving the entirety of the entrapment defense, that it stressed that a general instruction on the issue of reasonable doubt would not be sufficient to cure an entrapment instruction at variance with the one mandated in *Castro*:

> Further, *failure to place this burden [of disproving both elements of the entrapment defense] exclusively*

> *on the government will not be cured by the presence of a general charge that the government has the burden of proving the defendant's guilty beyond a reasonable doubt.*

Id. (emphasis supplied).

The instruction given by the trial court here was not only at variance with the law as set forth in the decisions of this Court and the decision of the Third Circuit in *Castro* as well, but it permitted the jury to consider the issue of inducement without at all considering whether defendant was predisposed toward committing the crime alleged. In case after case, this Court has stressed that the primary focus of the defense of entrapment is on the predispostion of the defendant. *See, e.g., Hampton v. United States*, 425 U.S. 484, 488 (1976); *United States v. Russell*, 411 U.S. 423, 429 (1973). Inducement is merely an element of predisposition:

> [T]he stronger the inducement, the more likely that any resulting criminal conduct of the defendant was due to the defendant's own predisposition. Under the unitary approach we require, *inducement therefore enters as an element of predisposition which the government must disprove, rather than as an independent element which the government must prove.*

United States v. Watson, 489 F.2d 504, 511 (3rd Cir. 1973).

(emphasis supplied).

In approving the instruction given by the trial judge, the Third Circuit accepted the following unsound syllogism proposed by the government:

Entrapment = inducement + no predisposition.

Therefore, Nonentrapment = no inducement or no predisposition.

(20a).

Though the logic of the Third Circuit is superficially appealing, it is flawed because it permits the jury to consider the elements of inducement and predisposition in isolation. Indeed, the instruction approved of by the appeals court permits the jury to avoid completely any consideration of the issue of predisposition, which the Third Circuit itself has repeatedly held is at the heart of the entrapment defense. *See, e.g., United States v. Gambino*, 788 F.2d 938, 944 (3rd Cir.), *cert. denied*, _____ U.S. _____, 107 S. Ct. 98 (1986) ("key consideration" in entrapment is predisposition of the accused); *United States v. Jannotti*, 729 F.2d 213, 225 (3rd Cir. 1984), *cert. denied*, 469 U.S. 880 (1984) (The "Supreme Court has clearly held that entrapment is, at bottom, a question of the defendant's predisposition and not the government's inducement, although the latter is a relevant consideration.") *United States v. Watson*, 489 F.2d 504, 511 (3rd Cir . 1973) (entrapment defense involves essentially "a single element", predisposition).

What is particularly disturbing about the appeals court's analysis is that though the court recognzied in footnote 3 of its opinion that the disjunctive instruction given by the trial judge would result in an injustice to a defendant when there is strong evidence of inducement and weak evidence of predisposition, the panel ignored that the posited circumstances were identical to the proofs here (15a). Indeed, there was no evidence in the record from which a jury could reasonably conclude that defendant was predisposed to commit the crime alleged. On the contrary, the evidence showed that Petitioner was a deeply religious man and a community leader and that the informant, by feigning cancer and seeking Petitioner's pity and friendship, induced Petitioner to become his accomplice.

Had the jury been instructed that it was to consider whether the government had met its burden of proof on both the issues of

inducement and predisposition, the jury would have concluded, from the complete absence of evidence of predisposition, that the government's inducement provided the only reasonable means of explaining Petitioner's behavior. The Court's instruction, however, permitted the jury to avoid any consideration whatever of the issue of predisposition. The failure of the trial court to charge the jury that the prosecutor had the burden of proof on both elements of the entrapment defense thus conflicted with the legal obligation of the government to disprove the entrapment defense in its entirety. *See United States v. Engler*, 806 F.2d 425, 428 (3rd Cir. 1986) (government must disprove the elements of the entrapment defense beyond a reasonable doubt); *United States v. Jannotti*, 673 F.2d 578, 597 (3rd Cir.), *cert. denied*, 457 U.S. 1106 (1982) ("government has the burden to disprove the *whole* entrapment defense beyond a reasonable doubt); *United States v. Watson*, 489 F.2d 504, 511 (3rd Cir. 1973) (government has burden of disproving entrapment beyond a reasonable doubt).

In *United States v. Jannotti*, 729 F.2d 213, 225 (3rd Cir. 1984), *cert. denied*, 469 U.S. 880 (1984), the Third Circuit had specifically held that an instruction permitting the element of inducement to be considered separate from the element of predisposition is error. In *Jannotti*, the Court noted that the trial judge repeatedly

> indicated that the defendants had a threshold burden of showing inducement. *Not only did this incorrectly divide the burden between the defendants and the government, but it also required an independent consideration of the issue of inducement, apart from the central issue of predisposition.*

Id. at 225.

The prejudicial danger created by the supplemental charge to the jury is that the jury may never have considered whether the government disproved the predisposition of the defendant beyond a reasonable doubt. Had the jury charge properly emphasized that the government had an obligation to prove defendant's predisposition to commit the crime alleged, an acquittal might well have resulted. This is particularly so because the Petitioner had no prior criminal record and there was ample evidence to create reasonable doubt about Petitioner's predisposition to commit the crime alleged.

Further, because the jury had earlier been instructed that the government had the burden of disproving beyond a reasonable doubt the entire entrapment defense, the jury may well have been confused by the supplemental instruction. In such circumstances, where two instructions are given to the jury and one is erroneous and the other is correct, reversible error is committed because it is impossible to tell which instruction the jury followed. *Nicola v. United States*; 72 F. 2d 780, 787 (3d Cir. 1934); *United States v. Walker*, 677 F. 2d 1014, 1016-1017 (4th Cir. 1982); *United States v. M&M Incorporated*, 562 F.Supp. 651, 660 (M.D.Pa. 1983). Particularly in a case such as this, where the erroneous instruction follows the correct one, and the jury decides the case shortly after receiving the erroneous instruction, reversal is mandated.

CONCLUSION

For the reasons set forth herein it is urged that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ALAN L. ZEGAS
Attorney for Petitioner

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THRID CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5659

UNITED STATES OF AMERICA,

Appellee

v.

GAWLI, SULTAN EL,

Appellant

On Appeal From the United States District Court for the District of New Jersey (D.C. Criminal No. 86-00034-01)

Argued October 6, 1987

Before: BECKER, SCIRICA and ROSENN, Circuit Judges

(Filed January 19, 1988)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

This appeal from a conviction for conspiracy to export weapons without a license from the government 22 U.S.C.§ 2778(b)(2) (1982), raises two important questions concerning the entrapment defense. First, we must decide whether the district court erred in failing to instruct the jury that the government, to defeat an entrapment defense, had to prove beyond a reasonable doubt both that the appellant was not induced by the government and that he was predisposed to commit the crime. The district court instructed the jury that proof beyond a reasonable doubt of either element was sufficient. Second, we must decide whether the district court erred in its definition of inducement. Specifically, appellant contents that the court's examples of types of inducement ("including persuasion, fraudulent representation, threats, coercive tactics, harassment, promises of reward or pleas based on need, sympathy or friendship") were too limiting, and that the district court's instruction that "[a] solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement," misstates the law.

For the reasons that follow, we hold that the court's

instructions were proper. The charge on the government's proof in defeating an entrapment defense correctly provided that the government merely must disprove either element of the entrapemnt defense beyond a reasonable doubt in order to disprove the entire defense. Furthermore, we believe that the district court's charge on inducement properly defined that element of the defense. We will therefore affirm the judgment.

I. FACTUAL AND PROCEDURAL HISTORY

Appellant Sultan El-Gawli first came to the United States from Egypt in 1969 and became an American citizen in 1977. El-Gawli is a businessman, who owns and operates, among other enterprises, a travel agency. El-Gawli first met Momdouh Zakkary Girguis (Zakkary), an Egyptian businessman, in June 1985 when Zakkary purchased airline tickets from El-Gawli's travel agency. After returning from his trip, Zakkary visited El-Gawli at the travel agency on July 31, 1981. Zakkary testified that at this meeting El-Gawli initiated discussions about procuring arms for Palestinian revolutionaries and asked Zakkary for assistance. Zakkary testified further that although he in fact had no experience in trading arms, he pretended to be familiar with arm sales in order to determine whether El-Gawli seriously contemplated purchasing arms. Zakkary testified that he perpetuated the charade, and met with El-Gawli again in August and September 1985 to continue discussions about weapon acquisition and transport. In contrast, El-Gawli testified that no discussion of arms transpired at the first several meetings between El-Gawli and Zakkary. Because of the initial contact between El-Gawli and Zakkary occured before the United States became involved, no tapes exist of the initial meetings between the two men. One of the key issues on which the parties focused at trial was who had initiated the discussions of arms sales.

On September 19, 1985, an auditor from the United States Customs Service conducted a routine investigation of Zakkary's motor vehicle part import business. Zakkary informed the auditor of his discussions with El-Gawli. As a result of that discussion, in early October 1985, a special agent of the United States Customs Service contacted Zakkary to follow up on the information Zakkary had given to the auditor. Zakkary agreed to cooperate in the government's investigation by posing as an arms procurer and by tape recording his subsequent conversations with El-Gawli. Zakkary ultimately tape recorded six in-person meetings and five telephone conversations with El-Gawli.

The first tape recorded meeting between El-Gawli and Zakkary, on November 8, 1985 consisted of Zakkary's describing to El-Gawli a supposed liaison with an American soldier who could provide weapons. The next meeting between El-Gawli and Zakkary occurred on November 12, 1985 but was not tape recorded. At that meeting El-Gawli introduced Zakkary to a man named Said Hassan who was later identified as the representative of the Palestine Liberation Organiztion (PLO) in Saudi Arabia. According to Zakkary, Hassan told Zakkary that he needed explosives and detonation devices for the "revolution people" in the Middle East. At trial there was much dispute about this unrecorded meeting, especially over who initiated discussion of arms sales. However, both versions of events agree that, as a result of the meeting, Hassan and Zakkary decided to conduct all further communication about the arms through El-Gawli, who agreed to serve as an intermediary.

In a meeting on November 15, 1985, Zakkary quoted prices to El-Gawli for the requested explosives and detonating devices, and El-Gawli wrote down the information.

In addition, Zakkary and El-Gawli negotiated over additional expenses for Zakkary. The parties agreed to a price of $12,000 for the arms and $13,000 for expenses. Additionally, at this meeting Zakkary complained of financial difficulties. El-Gawli explained that he would receive no remuneration, stating: "I am doing this for the sake of God. I am personally not going to gain anything out of it."

In subsequent conversations Zakkary informed El-Gawli of his fondness for him, of the fact that Zakkary had cancer, and that Zakkary had used his automobile as collateral in the weapons purchase. The negotiation on weapons deals also continued. On December 5, 1985, Zakkary brought a sample explosive to the travel agency and El-Gawli placed a call to Saudi Arabia to tell the PLO representative that the explosives were ready to be shipped. On December 13, 1985, El-Gawli, with Zakkary present, met with Hassan to quote prices. On December 17, 1985, Zakkary and El-Gawli met again to discuss the possibility of procuring helicopters. El-Gawli was arrested the following day. Both he and Said Hassan were charged with conspiracy to export defense articles from the United States without a license from the State Department. Because Hassan was unavailable to stand trial, El-Gawli was the sole defendant.

At trial, El-Gawli admitted that he had agreed to serve as intermediary in the conspiracy to export explosives and that he knew such activity was wrong. El-Gawli presented character witnesses who testified that he was a respected leader in the community, an honest, conservative, and non-violent person. El-Gawli raised the affirmative defense of entrapment. He claimed that he was not predisposed to dealing with arms because he was an honest, peaceful businessman who had never engaged in weapons trade. Furthermore, he argued that Zakkary's inducement in the form of pleas based on friendship and pity, and concern that

Hassan, a valued customer, might be annoyed with him, led him to participate in a conspiracy that he was otherwise disinclined to join.

The court instructed the jury as to the entrapment defense, and neither El-Gawli nor the government objected to the court's original charge. After two hours of deliberation, the jury, in considering the district court's instructions requested further instruction on the entrapment defense. The court reread its original entrapment charge and the jury returned to its deliberations. The next day the jurors renewed their question. In response, over timely objection by defense counsel, the court provided a supplementary charge which derived from this court's jurisprudence and *United States v. Burkley*, 591 F.2d 903, 913 (D.C. Cir. 1978), *cert. denied*, 475 U.S. 1029 (1986) that "the government must prove beyond a reasonable doubt both that the defendant was not induced by the government to commit the crime and that he was predisposed to commit the crime." The prosecutor objected to this portion of the charge and after brief discussion convinced the court to instruct the jury that the government only had to prove one element (either predisposition or lack of inducement) beyond a reasonable doubt. In pertinent part, the trial court instructed the jury that:

> [w]hen we deal with entrapment as raised by the defendant, it remains on the Government to prove beyond a reasonable doubt that the defendant was not induced by the Government to commit the crime *or* they must prove beyond a reasonable doubt that he was predisposed to commit the crime. So the burden on either

> the issue of inducement or predisposition remains on the Government beyond a reasonable doubt. I think your concern is what does that mean. If the defendant had no prior intent or predisposition to commit the offense charged and was induced or persuaded to do so by law enforcement officers or their agents, then he was entrapped. Inducement by law enforcement officials may take many forms, including persuasion, fraudulent representation, threats, coercive tactics, harassment, promises of reward or pleas based on need, sympathy or friendship. A solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement.

(emphasis supplied).

Ninety minutes after the district court issued its supplemental instruction, the jury convicted El-Gawli of conspiracy to export explosives without a license or approval of the State Department. This appeal followed.

II. DISCUSSION

El-Gawli contends that the district court's supplementary instruction constituted reversible error. He claims first, that the district court gave an incorrect instruction as to the government's burden in negating an entrapment defense, and second, that the district court erred in its instruction on inducement, defining that term too narrowly.

We review the district court's jury charges to decide "whether taken as a whole and viewed in light of the evidence," the charges "'fairly and adequately' submit the issues in the case to the jury." *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984), *cert denied*, 470 U.S. 1029 (1985).

A. The Government's Burden of Proof in Negating the Entrapment Defense

To address the first issue, we will briefly review the status of the entrapment defense in this jurisdiction. As we have explained, "[e]ntrapment occurs when a defendant who was not predisposed to commit the crime does so as a result of the government's inducement." *United States v. Jannotti,* 673 F.2d 578, 597 (3d Cir.), *cert. denied,* 457 U.S. 1106 (982) (*Jannotti I)* Under our jurisprudence, to make an entrapment defense a defendant must come forward with some evidence as to both inducement and non-predisposition. After the defendant has made this showing, which is a burden of production, the government then has the burden of proving beyond a reasonable doubt that it did not entrap the defendant. This court thus follows the so-called unitary approach, whereby after the defendant has made his original showing, the burden falls on the prosecution to prove beyond a reasonable doubt that the defendant was not entrapped. *See United States v. Gambino,* 788 F.2d 938, 943 (3d Cir.) *cert. deined,* 107 S. Ct. 98 (1986); *United States V. Jannotti,* 729 F.2d 213, 224 (3d Cir.), *cert. denied,* 69 AU.S. 880 (1984) *(Jannotti II)* (court giving entrapment charge "must follow the 'unitary' approach, in which the burden to disprove the entrapment defense as a whole, beyond a reasonable doubt, is placed exclusively on the government"); *Government of Virgin Islands v. Cruz,* 478 F.2d 712, 717 n.5 (3d Cir. 1973).

This court's aproach is distinct from the "bifurcated approach" adopted by the Courts of Appeals for the Disrict of Columbia and the Second Circuit. *See Jannotti II,* 729 F.2d at 224 (explaining that under the bifurcated approach "the jury must first consider whether the defendant has met his

burden on the issue of inducement"). Jurisdictions that employ the bifurcated approach have established a procedural minuet by which the defendant need only come forth with some evidence as to inducement, and then the burden shifts to the government which can either rebut the evidence to inducement, or prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *United States v. Burkley,* 591 F.2d 903, 914-15 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 966 (1979). In the final analysis, however, courts adopting the bifurcated approach believe that "it is appropriate to place on the defendant the ultimate burden of showing government inducement of the crime, and thus the possibility of entrapment." *Id.* at 914 (citation omitted).

A major motivation for rejecting the bifurcated approach was our disapproval of the fact that it required the defendant to shoulder a substantial burden in making this defense. *See Jannotti II,* 729 F. 2d at 224 ("the unitary approach is more consistent with the government's ultimate burden of proving the defendant's guilt beyond a reasonable doubt"). *Cf. Cruz,* 478 F.2d at 717 (holding that a charge that creates the erroneous impression that the defendant must carry the burden of proof as to the positive elements of an entrapment defense constitutes reversible error if properly raised before the district court). By adopting the unitary approach, we indicated our belief that the government had the entire burden of disproving entrapment beyond a reasonable doubt. Therefore, the extent of the defendant's burden constitutes the significant distinction between the two approaches.

El-Gawli argues that the district court erred in charging the jury that the government need only disporve one element of the entrapment defense (the "or" charge). Instead,

El-Gawli contends, the court should have instructed the jury that the government had the burden of proving *both* that it did not induce him *and* that he was not predisposed to commit the crime (the "and"charge). He argues that the "or" charge contravenes our unitary approach because it bifurcates the entrapment defense and fails to place the burden on the government to disprove the whole defense. El-Gawli's logic is that because the entrapment defense encompasses two elements, governmental inducement and lack of predisposition, to defeat the entrapment defense, the government must disprove *both* elements.

Furthermore, El-Gawli argues that the "or" charge diverted the jury from the evidence concerning his best argument, lack of predisposition. He submits that instead of focusing on El-Gawli's lack of predisposition, the jury was able, through the alternative offered by the disjunctive charge, to determine that the government did not induce him to participate in the weapons conspiracy. Therefore, El-Gawli claims the jury ignored the heart of his entrapment defense--that he was a non-violent, respected citizen who was disclined to participate in weapons deals or play spy.[1] El-Gawli claims that far from constituting harmeless error, the instruction was decisive in El-Gawli's conviction. El-Gawli cites the fact that it took the jury only ninety minutes to reach a verdict after the court issued its supplementary instructions as an indication of

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1. In his brief, El-Gawli emphasizes his contributions to society and his leadership in the community. El-Gawli arrived in the United States penniless and worked his way up from a baker's assistant to a successful businessman and respected community leader. He notes that no evidence whatsoever exists to imply that his thriving enterprises are illegitimate. Furthermore, he claims that he participated in the conspiracy only reluctantly to placate a valued customer and then only in response to the relentless requests of Zakkary whom he pittied.

the centrality of this supplementary charge to the guilty verdict.

Finally, El-Gawli relies on our holding in *Castro* for the proposition that this Court has explicitly required an "and" charge wherein the government must disprove both elements of an entrapment defense beyond a reasonable doubt. He cites our language in *Castro,* 776 F.2d at 1128, that "the government must prove beyond a reasonable doubt both that the defendant was not induced by the government to commit the crime and that he was predisposed to commit the crime" as evidence that the district court erred in its charge on entrapment.

The Government defends the "or" charge arguing that, as a logical matter, it must only disprove one element of the entrapment defense to disprove the entire defense. In making its argument, the government presents the following logical syllogism:

Entrapment = inducement + predisposition.

Therefore, Nonentrapment + no inducement *or* no predisposition.

We find the logic of the government's position compelling. El-Gawli's insistence that the jury was diverted from its true inquiry by the "or" charge makes no sense. If, as El-Gawli concedes in this brief and at oral argument, the jury found no governmental inducement in this case, then what, if not some predisposition on the part of El-Gawli, caused him to participate in the conspiracy? El-Gawli has called to our attention language from this court's opinions noting the importance of the government's proving beyond a reasonable doubt that the defendant was predisposed to commit the crime. *See, e.g., United States v. Gambino,* 778 F.2d 938, 944 (3d Cir.), *cert. denied,* 107 S. Ct. 98 (1986) (predisposition is a

"key consideration"); *Jannotti II*, 729 F.2d at 224 (The "Supreme Court has clearly held that entrapment is, at bottom, a question of the defendant's predisposition and not the government's inducement, although the latter is a relevant consideration.") We think, however, that El-Gawli fails to place these statements in proper context. Where the government has induced the defendant to commit the crime, the question of predisposition rightfully becomes crucial. The government must, in those circumstances, demonstrate that it was merely laying a trap for an "unwary criminal," and not seducing some otherwise upright citizen into lawless behavior. *Sherman v. United States*, 356 U.S. 369, 372 (1958). In this case, however, as El-Gawli himself concedes, the jury found no governmental inducement. Therefore, the emphasis in the caselaw on predisposition does not apply to this defendant.

Furthermore, we believe that El-Gawli makes a fundamental, conceptual error in arguing that this court's adoption of the unitary approach mandates that the government prove both elements. In instructing that the government must disprove the whole defense of entrapment, we rejected the bifurcated approach which requires the defendant to prove by a preponderance of the evidence that he was induced in order for the defense of entrapment to reach the jury. In this circuit, that the government bears the entire burden does not affect the fundamental truth that entrapment can be disproved in one of two ways, either by proving beyond a reasonable doubt that the defendant was not induced, or by proving beyond a reasonable doubt that he was predisposed to commit the crime.

We note that other courts of appeals, including those that have adopted the unitary approach, use the "or" formulation. *See United States v. Gunter,* 741 F.2d 151, 153 (7thCir. 1984) (government must "prove beyond a reasonable doubt that the defendant was predisposed *or* there was no Government inducement") (emphasis added); *Sagansky v. United States,* 358 F.2d 195, 203 (1st Cir.) (holding that the government would meet its burden of defeating an entrapment defense if it proved "beyond a reasonable doubt *either* that there was in fact no inducement *or* that the defendant was predisposed....") (emphasis added), *cert. denied,* 385 U.S. 816 (1966). *See also United States v. Rangel,* 534 F.2d 147, 149 (9th Cir.) (ruling that even if evidence as to predisposition was inadmissible, overwhelming evidence that government had not induced defendant to commit the crime sufficed to disprove entrapment defense), *cert. denied,* 429 U.S. 854)1976).

El-Gawli's argument for an "and" charge derives from our decision in *United States v. Castro,* 776 F.2d 1118 (3d Cir. 1985), *cert. denied,* 475 U.S. 1029 (1986). Although the argument is superficially appealing, it has, upon closer scrutiny, little merit. In *Castro,* the government charged nine defendants with attempting to sell drugs. Castro, one of the defendants, argued that he was not predisposed to commit the crime, and that he committed the crime only because of the government's inducement. In instructing the jury, the district court noted that the government has presented "no evidence that [Castro] was predisposed to drug activities." 776 F.2d at 1127. Therefore, the district court instructed that the key question in deciding the entrapment defense was whether the jury could "interpret the evidence as establishing that Mr. Castro was voluntarily and without any urging from the

Government acting as an interpreter in the [drug] transaction." *Id.* at 1127-28. Inexplicably, the district court instructed the jury that the government must prove predisposition beyond a reasonable doubt, but failed to give an analogous instruction on the government's burden for proving inducement. On appeal, Castro asserted this as error, and this court agreed that failure to clarify the government's burden constituted error.[2] In acknowledging that the district court had indeed erred in its charge to the jury, the *Castro* court explained that:

> once the court decided to give an entrapment chrage, the court must instruct the jury that the government must prove beyond a reasonable doubt both that the defendant was not induced by the government to commit the crime and that he was predisposed to commit the crime.

Id. at 1128 (citation omitted). We agree with El-Gawli that a reading of this language from *Castro* could appear to indicate that this court requires a conjunctive "and" charge on entrapment, requiring the government to disprove both elements. When viewed in context, however, it is plain that *Castro* does not mandate the "and" charge, but merely requires that whichever prong of the entrapment defense the jury rejects, it must reject it beyond a reasonable doubt. In *Castro, the defendant's entrapment argument centered upon inducement, but as we have noted, the trial court only instructed the jury about the government's burden for predisposition. In light of those facts, it is clear this court was*

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2. *The Castro* panel ultimately rejected the challenge because it had not been raised by defendant's counsel in the district court. *Castro* held that the court's charge was not so egregious that it rose to the level of plain error, and therefore, given the posture of the challenge, refused to consider it.

holding that the district court had to instruct the jury about the burden of proof for both elements, not that both elements had to be proved in order to defeat an entrapment defense.

The government's burden in disproving an affirmative defense of entrapment should be viewed as a logical sequence. Assuming the defendant has met his burden of coming forth with some evidence on both elements of the entrapment defense, the government may first attempt to prove beyond a reasonable doubt that it did not induce the defendant to commit the crime. If it can do so, the inquiry is over. Without inducement by the government, there can be no entrapment. Notably, that is exactly what happened in El-Gawli's case. In many cases, however, the government will have engaged in some form of inducement. In such cases, the question of predisposition is paramount and the government must prove beyond a reasonable doubt that its inducement merely facilitated the defendant who was ready and willing to commit a similar crime.[3]

B. *The District Court's Instruction on Inducement*

El-Gawli's second argument, which he contends is intimately related to his first point, concerns the definition of

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3. Although we dismiss with no hesitation El-Gawli's argument that he deserved an "and" charge, we nevertheless note that there is one type of case, not presented by El-Gawli, which presents a stronger argument for a conjunctive charge. One could postulate a case in which the government's inducement was extraordinarily heavy and the predisposition of the defendant was very slight. Under the "or" charge, the government could disprove an affirmative defense of entrapment if it proved beyond a reasonable doubt that the defendant, however slightly, was predisposed to commit the crime. Under the facts so postulated, an "or" charge might allow the government to dispose of an entrapment defense unfairly. We think this dilemma can be solved, not by adopting El-Gawli's "and" charge approach, but rather by careful instruction to the jury on the definition of predisposition and the government's burden of proving it beyond a reasonable doubt.

inducement that the judge offered to the jury. The logic of his argument is as follows. El-Gawli claims that the overly restrictive definition of inducement led the jury to find no governmental inducement, which in turn led the jury to disregard the essential question of predisposition. We have already dismissed El-Gawli's argument that the government had to disprove both elements in order to disprove entrapment. Nevertheless, we must address his specific argument that the jury found no inducement because the district court erred in explaining the legal standard.

First, El-Gawli objects to the court's instruction that "[a] solicitation, request or approach by law enforcement officials to engage in criminal activity, standing alone, is not an inducement." El-Gawli argues that the quoted language incorrectly states the law in this circuit. We disagree. El-Gawli has cited no case from this court indicating that the quoted charge inaccurately portrays the law. To the contrary, we hold that this statement accurately summarizes the definition of inducement. We note that at least two jurisdictions besides the Court of Appeals for the District of Columbia, which authorized this part of the charge, employ similar principles.[4]

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4. We also find it insignificant that this language originally appeared in the "red book" of jury instructions formulated by the Bar Association of the District of Columbia and used by the District Court for the District of Columbia. *See* Young Lawyers Section of the Bar Ass'n of the Dist. of Columbia, *Criminal Jury Instructions* No. 505 at 333 (3d ed. 1978); *Burkley*, 591 F.2d at 913. El-Gawli makes the argument that it was unfair to him for the district court to adopt a charge on inducement borrowed from a court that utilizes the bifurcated approach. See *supra* typescript at 9-10 for a discussion of the bifurcated approach. In the abstract, we agree with El-Gawli that we should take care of adopting an instruction on inducement from a jurisdiction that still employs the bifurcated approach, although not for the reasons he suggests. However, we need not address this complex

See United States v. Barry, 814 F.2d 1400, 1402 n.2 (9th Cir. 1987) ("Inducement requires more than mere suggestion or solicitation by a government agent.") (citation omitted); *United States v. Velasquez,* 802 F.2d 104, 106 (4th Cir. 1986) (evidence of mere solicitation insufficient to meet even defendant's minimal burden of coming forth with more than a scintilla of evidence of inducement); *United States v. North,* 746 F.2d 627, 631 (9th Cir. 1984) (allowing an instruction that included language identical to the challenged instruction in El-Gawli's case), *cert. denied,* 470 U.S. 1058 (1985).

Furthermore, El-Gawli objects to the court's charge that:

> Inducement by law enforcement officials may take many forms, including persuasion, fraudulent representation, threats, coercive tactics, harassment, promises of reward or pleas based on need, sympathy or friendship.

El-Gawli cites no caselaw from this or any other court indicating any objection to the charge on inducement given by the district court. We also note that this charge, or minor variations on it, is given by other courts, including those that use the unitary approach, in explaining the concept of inducement to juries. *See e.g., North,* 746 F.2d at 631 (holding that a district court properly exercised its discretion in instructing the jury that "undercover activity may take many forms including persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward or

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question or the strained logic of El-Gawli's argument because, in this particular case, we find the instruction perfectly in harmony with our jurisprudence and we see no prejudice to the defendant.

pleas based on need, sympathy or friendship").

El-Gawli argues that the specific examples of inducement in the charge did not encompass the full breadth of activities that could constitute inducement. He does not, however, explain how this charge damages his chances for a jury finding of inducement, nor does he suggest additional examples that the district court should have provided. Rather, he argues that the district court should have reread its general explanation of inducement without offering any examples at all. In light of the jury's confusion, we cannot agree. A list of examples, when presented as such and not as a finite group of possibilities, may be very helpful in explaining the concept of inducement. If anything, it seems to us that the court's mention of "pleas based on frienship and need" would have helped the jury find inducement had they credited El-Gawli's testimony. It is apparent to us that in this case, where the appellant received absolutely no money for acting as a middle man in a weapons transaction, the jury simply believed, beyond a reasonable doubt, that he was not induced. We therefore reject El-Gawli's challenge.

III.

For the foregoing reasons, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Thrid Circuit

ORDER OF UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT AMENDING OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5659

UNITED STATES OF AMERICA,

Appellee

v.

GAWLI, SULTAN EL,

Appellant

On Appeal From the United States District Court for the District of New Jersey (D.C. Criminal No. 86-00034-01)

Argued October 6, 1987

Before: BECKER, SCIRICA and ROSENN, Circuit Judges

(Filed January 19, 1988)

ORDER AMENDING OPINION

It is ORDERED that the slip opinion filed in the above-captioned case is amended as follows:

On p. 10, carryover paragraph, 3rd line, REPLACE:

> *and* that he was not predisposed to commit the crime (the "and" charge).

WITH:

> *and* that he was predisposed to commit the crime (the "and" charge).

On p. 11, third full paragraph, REPLACE:

> Entrapment = inducement + predisposition.
> Therefore, Nonentrapment + no inducement *or* no predisposition.

WITH:

> Entrapment = inducement + no predisposition.
> Therefore, Nonentrapment = no inducement *or* predisposition.

on p. 12, first full paragraph, REPLACE:

> In instructing that the government must disprove the whole defense of entrapment, we rejected the bifurcated approach which requires the defendant to prove by a preponderance of the evidence that he was induced in order for the defense of entrapment to reach the jury.

ORDER

WITH:

In instructing that the government must disprove the whole defense of entrapment, we rejected the bifurcated approach which places upon the defendant the ultimate burden of showing that he was induced.

/s/ Edward R. Becker

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Circuit Judge

DATED: February 25, 1988

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5659

UNITED STATES OF AMERICA,

v.

GAWLI, SULTAN EL,

Appellant

(D.C. Criminal No. 86-00034-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE ----------DISTRICT OF NEW JERSEY

Present: BECKER, SCIRICA and ROSENN, *Circuit Judges*

JUDGEMENT

This cause came on to be heard on the record from the United States District Court for the ----------District of New Jersey and was argued by counsel on October 6, 1987

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 6, 1986, be, and the same is hereby affirmed.

ATTEST

Dated: January 19, 1988 _____

Clerk

ORDER OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5659

UNITED STATES OF AMERICA,

Appellee

v.

GAWLI, SULTAN EL,

Appellant

SUR PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

Present: SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and ROSENN,* *Circuit Judges*

The petition for rehearing filed by appellant Sultan El-Gawli having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

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*. As to panel rehearing only.

ORDER

voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

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Circuit Judge

DATED: February 17, 1988

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

CONSTITUTION OF THE UNITED STATES:

"Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS:

"28 U.S.C. Sec. 2778 (b) (2)

Except as otherwise specifically provided in regulations issued under subsection (a) (1), no defense articles or defense services designated by the President under subsection (a) (1) may be exported or imported without a license for such export or import, issued in accordance with this Act and regulations issued under this Act, except that no license shall be required for exports or imports made by or for an agecny of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.